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**CONSTRUCTION CONTRACT****U.S. Department of Housing  
and Urban Development**

Project Name: \_\_\_\_\_

Cost Plus Contract \_\_\_\_\_

HUD Project No.: \_\_\_\_\_

Lump Sum Contract \_\_\_\_\_

**THIS AGREEMENT**, made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between  
 \_\_\_\_\_ (hereinafter called the "Contractor") and  
 \_\_\_\_\_ (hereinafter called the "Owner").

**The Contractor and the Owner agree as follows:**

**Article 1: Scope of Contract**

A. The Contract between the parties is set forth in the "Contract Documents," which consist of this Agreement and the other documents identified in Article 2 below. Together, these form the entire Contract between the Owner and Contractor, and by this reference these Contract Documents are fully incorporated herein. Any previously existing contract or understanding concerning the work contemplated by the Contract Documents is hereby revoked.

B. Except to the extent specifically indicated in the Contract Documents to be the responsibility of others, the Contractor shall furnish all of the materials and perform all of the work, within the property lines, shown on, and in accordance with, the Drawings and

Specifications.

## **Article 2: Identification of Contract Documents**

A. The Contract Documents are identified as follows:

(1) This Agreement. If designated above as Cost Plus Contract, Articles 4 and 13 are applicable to this Agreement. If designated above as Lump Sum Contract, Articles 4A and 13A are applicable to this Agreement.

(2) The General Conditions set forth in the General Conditions of the Contract for Construction, AIA Document A201-1997, expressly excepting those provisions mandating binding arbitration. The provisions of this Agreement take precedence over any inconsistent provisions in the General Conditions.

(3) The Supplementary Conditions of the Contract for Construction, Form HUD-92554.

(4) The HUD Special Conditions are set forth in the Project Manual dated \_\_\_\_\_, 20\_\_\_\_, identified as follows:

Document	Title	Pages
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(5) The Specifications are those contained in the Project Manual dated \_\_\_\_\_, as in subparagraph 4, and are as follows:

Section	Title	Pages
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(6) The Drawings are as follows, and are dated as shown below:

Number	Title	Pages	Date
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(7) The Contractor's and/or Mortgagor's Cost Breakdown, Form HUD-2328, approved by HUD on the date of \_\_\_\_\_, 20\_\_\_\_, attached hereto as Exhibit \_\_\_\_\_.

(8) If this is designated a Cost Plus Contract and there is no Identity of Interest between the Contractor and the Owner, the Incentive Payment Computation form, page 2 of Form HUD-92443, and attached hereto as Exhibit \_\_\_\_\_.

(9) The Prevailing Wage Determination No. \_\_\_\_\_, dated \_\_\_\_\_, 20\_\_\_\_.

(10) Completed and fully-executed Appendix 8 of Handbook 4430.1, identifying Identities of Interest among Owner, Contractor, Subcontractors, Architect.

B. The Drawings and the Specifications were prepared by \_\_\_\_\_ (hereinafter called the "Design Architect"). The architect administering the Construction Contract work is \_\_\_\_\_ (hereinafter called the "Supervisory Architect.").

C. A master set of the Drawings and of the Project Manual, identified by the signatures of the Owner, the Contractor, the Design Architect, the Supervisory Architect, and the Contractor's Surety or Guarantor, have been placed on file with HUD, and shall govern in all matters that arise with respect to the Contract Documents.

D. Changes in the Drawings, Specifications, or any terms of the Contract Documents, including orders for extra work, changes by altering or adding to the work,

orders which will change the design concept, or orders extending the Final Completion Deadline (defined in Article 3) may be effected only with the prior written approval of the Owner's Lender (more particularly identified in paragraph D of Article 11 below, and hereinafter referred to as the "Lender") and HUD, and under such conditions as either the Lender or HUD may establish.

### **Article 3: Time**

A. The Contractor shall commence the work to be performed under this Contract within \_\_\_\_\_ days of this Agreement and shall bring the work to Final Completion by \_\_\_\_\_, 20\_\_ (hereinafter called the "Final Completion Deadline").

B. The Date of Final Completion shall be the date of the final HUD Representative's Trip Report, provided that the trip report is subsequently endorsed as required by HUD. Final Completion includes all construction requirements, including but not limited to completion of all punch list items, executed HUD Form 92485, Permission to Occupy - Property Mortgages, As-Built Survey and Surveyor's Report, As-Built Plans and Specifications, warranties, and execution and acceptance of all change orders.

C. The Final Completion Deadline may be extended in accordance with the terms of the said AIA General Conditions only with the prior written approval of HUD.

D. The Contractor shall correct any defects due to faulty materials or workmanship which appear within one year from the Date of Final Completion.

E. If the work is not brought to Final Completion in accordance with the Drawings and Specifications, including any authorized changes, by the Final Completion Deadline, or by such date to which the Final Completion Deadline may be mutually extended by approved change order, the maximum sum stated in Article 4 or 4A below shall be reduced by \$\_\_\_\_\_, as liquidated damages, for each day of delay until the actual Date of Final Completion. When the Owner submits to HUD its Cost Certification, the actual cost of interest, taxes, insurance, mortgage insurance premiums, and construction and permanent loan extension fees, as approved by HUD, for the period from the Final Completion Deadline through the Date of Final Completion, shall be determined. The lesser of the liquidated or actual damages shall be applied. The applicable amount shall

be reduced by the project's net operating income, as determined by HUD, for the delay period.

F. The parties have completed the appropriate blank spaces in Articles 4 or 4A below with respect to "Incentive Payment," providing for the payment of an additional sum to the Contractor as an incentive for completing the project earlier than the Final Completion Deadline, or by such date to which the Final Completion Deadline may be extended by approved change order. If the work is brought to Final Completion before the Final Completion Deadline, the contract sums stated in Articles 4 and 4A below shall be increased, as indicated, by an incentive payment calculated in accordance with HUD requirements. In cases requiring cost certification by the Contractor, the Contractor will not be entitled to any incentive payment resulting from early completion if HUD determines that the Contractor's cost certification is fraudulent or materially misrepresents the Contractor's Actual Cost of Construction.

#### **Article 4: Contract Sum -- Cost Plus Contract**

A. Subject to the provisions hereinafter set out, the Owner shall pay to the Contractor for the performance of this Contract the following items in cash:

- (1) The Actual Cost of Construction as defined in Article 13 below; plus
- (2) Builder's Profit of \$ \_\_\_\_\_ .

In no event, however, shall the total cash payable pursuant to this paragraph A exceed \$\_\_\_\_\_ .

B. In addition to any cash fee provided for in paragraph A, the Owner shall pay to the Contractor by means other than cash, the following:

- (1) A promissory note in the form prescribed by HUD in the amount of \$ \_\_\_\_\_ .
- (2) \_\_\_\_\_

C. If, upon completion, the Contractor shall have received cash payments in excess of (a) the Actual Cost of Construction, plus (b) the Builder's Profit, plus any additional amount to be paid under the provisions of paragraph B, all such excess shall

be refunded to the Owner.

D. Incentive Payment, where there is no Identity of Interest between Owner and Contractor:

(1) If there is no Identity of Interest between the Owner and the Contractor and the work is completed prior to the Final Completion Deadline, the Owner shall make an incentive payment to the Contractor. The amount of the payment shall be determined according to Exhibit \_\_\_\_, attached hereto, consisting of page 2 of Form HUD-92443, entitled Incentive Payment Computation. Step 3(b) thereof contains a blank that is to be filled in at the time this Construction Contract is executed.

(2) If, upon completion, the Contractor shall have received cash payments in excess of (a) the Actual Cost of Construction, plus (b) the Builder's Profit, plus any additional amount to be paid under the provisions of paragraph B, plus the incentive payment under the provisions of paragraph 1 above, all such excess shall be refunded to the owner.

(3) No incentive payment will be allowed on savings in costs disallowed by HUD or if the Contractor's cost certification is found by HUD to be either fraudulent or to materially misrepresent the Actual Cost of Construction.

E. Incentive Payment, where there is an Identity of Interest between Owner and Contractor:

(1) If there is any Identity of Interest between the Owner and the Contractor, the cash upset figure set forth at the end of paragraph A, immediately above, is hereby increased by the amount by which \$\_\_\_\_\_ (the estimated sum of mortgage interest, taxes, and property insurance and mortgage insurance premiums applicable to the construction period for this project) exceeds the mortgagor's certified actual cost for these items through the Date of Final Completion,

as approved by HUD, provided that construction is completed prior to the Final Completion Deadline, as amended by approved change order, and, further, that in no event shall the total cash payable exceed the actual cost of construction as approved by HUD.

(2) If the aggregate interest rate during the construction period is determined at the time of cost certification to be less than that upon which the mortgage note was endorsed, the estimated amount for interest, line 53 of form HUD-92264, shall be adjusted accordingly and the dollar amount set forth in paragraph E(1) shall be reduced.

#### **Article 4A: Contract Sum -- Lump Sum Contract**

A. The Owner shall pay the Contractor for the performance of the contract, hereinafter provided, the sum of \$\_\_\_\_\_ (\_\_\_\_\_/100 dollars).

B. Incentive Payment: If the work is completed prior to the Final Completion Deadline, the Owner shall pay to the Contractor, in addition to the contract sum stated in paragraph A, an amount equal to \_\_\_\_% (not to exceed 50%) of the amount by which the sum of the Owner's certified cost of interest, real estate taxes, insurance premiums and Mortgage Insurance premium during construction, as approved by HUD through the Date of Final Completion, is exceeded by HUD's estimates of these same items, which estimate is \$\_\_\_\_\_. (Insert that portion of the sum of interest, taxes, insurance, and Mortgage Insurance premium that appears in Section G of Form HUD-92264 attributable to the construction period. If there has been a change in the interest rate charged for the construction period, the dollar amount included in Section G of HUD-92264 must be adjusted. The adjusted amount must be reflected in the savings computation). No incentive payment will be allowed on savings in costs disallowed by HUD or if the Contractor's cost certification is found by HUD to be either fraudulent or to materially misrepresent the Actual Cost of Construction.

## **Article 5: Requisition and Payment Procedures**

A. Each month after the commencement of work hereunder, the Contractor shall make a monthly request on Form HUD-92448 for payment by the Owner for work done during the preceding month. Each request for payment shall be filed at least 15 days before the date payment is desired. Subject to the approval of the Lender and HUD, the Contractor shall be entitled to payment thereon in an amount equal to (1) the total value of classes of the work acceptably completed; plus (2) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; plus (3) the value of components stored off-site in compliance with applicable HUD requirements; less (4) 10 percent holdback and less prior payments. The "values" of (1), (2) and (3) shall be computed in accordance with the amounts assigned to classes of work in the "Contractor's and/or Mortgagor's Cost Breakdown," attached hereto as Exhibit "A".

B. With its final application for payment by the Owner, the Contractor shall disclose, on a form prescribed by HUD, all unpaid obligations contracted in connection with the work performed under this Contract. The Contractor agrees that within 15 days following receipt of final payment, it will pay such obligations in cash and furnish satisfactory evidence of such payment to the Owner.

C. The balance due the Contractor hereunder shall be payable upon the expiration of 30 days after the work hereunder is fully completed, provided the following have occurred: (1) All work hereunder requiring inspection by municipal or other governmental authorities having jurisdiction has been inspected and approved by such authorities and by the rating or inspection organization, bureau, association or office having jurisdiction; (2) All certificates of occupancy, or other approvals, with respect to all units of the project have been issued by State or local governmental authorities having jurisdiction; and (3) Permission(s) to Occupy (Form HUD-92485) for all units of the project have been issued by HUD; (4) all executed final advance documents required by HUD have been submitted.



## **Article 6: Receipts, Releases of Liens & Payments for Materials & Equipment**

A. The Contractor agrees that within 15 days following receipt of each monthly payment, it will pay in full and in cash all obligations for work done and materials, equipment and fixtures furnished through the date covered by such monthly payment. The Contractor may withhold retainage from the payment due each subcontractor, corresponding to, but not exceeding, the 10 percent holdback specified in item (4) of Article 5, paragraph A.

B. The Owner may require the Contractor to attach to each request for payment its acknowledgment of payment and all subcontractors' and material suppliers' acknowledgments of payment for work done and materials, equipment and fixtures furnished through the date covered by the previous payment.

C. The Contractor agrees that no materials or equipment required by the Specifications will be purchased under a conditional sale contract or with the use of any security agreement or other vendor's title or lien retention instrument.

D. Concurrently with the final payment, the Contractor shall execute a waiver or release of lien for all work performed and materials furnished hereunder, and the Owner may require the Contractor to obtain similar waivers or releases from all subcontractors and material suppliers.

## **Article 7: Obligations of Contractor**

A. The Contractor shall furnish, at its own expense, all building and other permits, licenses, tools, equipment and temporary structures necessary for the construction of the project. The Contractor shall give all required notices and shall comply with all applicable codes, laws, ordinances, rules and regulations, and protective covenants, and with the current regulations of the National Board of Fire Underwriters, wherever applicable. The Contractor shall comply with the provisions of the Occupational Safety and Health Act of 1970. The Contractor shall immediately notify the Owner, the Lender and HUD of the delivery of all permits, licenses, certificates of inspection, certificates of occupancy, and any other such certificates and instruments

required by law, regardless of to whom issued, and shall cause them to be displayed to the Owner, the Lender and HUD upon request.

B. If the Contractor observes that the Drawings and Specifications are at variance with any applicable codes, laws, ordinances, rules or regulations, or protective covenants, it shall promptly notify the Supervisory Architect in writing, and any necessary changes shall be made as provided in this Contract for changes in the Drawings and Specifications. If the Contractor performs any work knowing it to be contrary to such codes, laws, ordinances, rules or regulations, or protective covenants, without giving such notice to the Supervisory Architect, it shall bear all costs arising therefrom.

C. Upon completion of construction, the Contractor shall furnish to the Owner a topographic land survey map showing the location on the site of all improvements constructed thereon, and showing the location of all water, sewer, gas and electric lines and mains, and of all existing utility easements. Such survey map shall be prepared by a licensed surveyor who shall certify that the work is installed and erected entirely upon the land covered by the mortgage and within any building restriction lines on said land, and does not overhang or otherwise encroach upon any easement or right-of-way of others. Such survey shall be accompanied by a Surveyor's Report in the form required by HUD. In addition, the Contractor shall furnish additional surveys when required by the Owner for any improvements, including structures and utilities, not heretofore located on a survey. The Contractor shall furnish copies of such survey required hereunder for the Lender and HUD. The Contractor shall provide progress survey maps from time to time that show the improvements to be entirely within the property and set-back boundaries, and not encroaching upon any easements, as part of applications for payment. The Contractor shall provide updated final survey maps and Reports for Final Closing, in accordance with HUD requirements, including but not limited to Federal regulations, handbooks, and relevant HUD administrative guidance.

D. The Contractor shall assume full responsibility for the maintenance of all landscaping which may be required by the Drawings and Specifications until such time as both parties to this Contract shall receive written notice from HUD that such landscaping has been finally completed. The Owner hereby agrees to make available to

the Contractor, for such purpose, without cost to the latter, such facilities as water, hose and sprinkler.

E. The Contractor shall establish an escrow in an amount satisfactory to the Lender and HUD for any work items that are incomplete at the time of Final Closing.

### **Article 8: Assurance of Completion**

The Contractor shall furnish to the Owner assurance of completion of the work in the form of (specify) \_\_\_\_\_. Such assurance of completion shall run to the Owner and the Lender as obligees and shall contain a provision whereby the surety agrees that any claim or right of action that either the Owner or the Lender might have thereunder may be assigned to HUD.

### **Article 9: Waiver of Lien or Claim**

A. The Contractor shall not file a mechanic's or materialman's lien or maintain any claim against the Owner's real estate or improvements for or on account of any work done, labor performed or materials furnished under this Contract, and shall include in each subcontract a clause which shall impose this requirement on the subcontractor.

B. In jurisdictions where permitted by law, the Owner may require the Contractor to execute a Waiver of Liens that shall be recorded prior to the commencement of construction. The Contractor for itself, subcontractors, suppliers, materialmen, and all persons acting through or under it, shall agree not to file or maintain mechanics' lien or claim against the property described herein, on account of work done, labor performed or materials provided by them.

### **Article 10: Right of Entry and Interpretation of Contract Documents**

A. At all times during construction, HUD, the Lender, and their agents or assigns shall have the right of entry and free access to the project and the right to inspect all

work done and materials, equipment and fixtures furnished, installed or stored in and about the project. For such purpose, the Contractor shall furnish such enclosed working space as the Lender or HUD may require and find acceptable as to location, size, accommodations and furnishings.

B. HUD shall have the right to interpret the Contract Documents and to determine compliance therewith.

### **Article 11: Assignments, Subcontracts and Termination**

A. This Contract shall not be assigned by either party without the prior written consent of the other party, the Lender and HUD, except that the Owner may assign the Contract, or any rights hereunder, to the Lender or HUD.

B. The Contractor shall not subcontract all of the work to be performed hereunder without the prior written consent of the Owner, the Lender and HUD.

C. Upon request by the Owner, the Lender or HUD, the Contractor shall disclose the names of all persons with whom it has contracted or will contract with respect to work to be done and materials and equipment to be furnished hereunder.

D. The Contractor understands that the work under this contract is to be financed by a building loan to be secured by a mortgage and insured by HUD, and that the terms of said loan are set forth in a Building Loan Agreement between the Owner as Borrower and \_\_\_\_\_ as Lender.

E. The Contractor further understands that said Building Loan Agreement provides that, in the event of the failure of the Owner to perform its obligations to the Lender thereunder, the Lender may, as attorney-in-fact for the Owner, undertake the completion of the project in accordance with this Contract. In the event the Lender elects not to undertake such completion, the Contractor's obligations under this contract shall terminate.

### **Article 12: Roles of HUD and Lender**

HUD is the insurer of the Lender's loan made to finance the construction identified herein, pursuant to the Building Loan Agreement referenced above in Article 11. Nothing provided herein, no action or inaction of the parties to this contract, or actions or inaction by any third parties, shall impute to HUD or the Lender status as a party to this Agreement.

### **Article 13: Certification of Actual Cost -- Cost Plus Contract**

A. The "Actual Cost of Construction" shall include all items of cost and expense incurred by the Contractor in the performance of this Contract and shall include an allowance for general overhead in the amount set forth in the Contractor's and/or Mortgagor's Cost Breakdown. Allowable items of cost and expense incurred by the Contractor in the performance of this Contract shall include costs and expenses of labor, materials for construction, equipment and fixtures, field engineering, sales taxes, workmen's compensation insurance, social security, public liability insurance, general requirements and all other expenses directly connected with construction. The value of any kickbacks, rebates or discounts received or receivable in connection with the construction of the project shall be subtracted from all items of cost and expense. Any cost or expense attributable to maintaining the Contractor's working capital is not to be included within the "Actual Cost of Construction."

B. The Contractor shall keep accurate records of account of the said Actual Cost of Construction, and shall, upon demand, make such records and invoices, receipts, subcontracts and other information pertaining to the construction of the project available for inspection by the Owner, Lender and HUD.

C. With its final application for payment, the Contractor shall furnish to the Owner a completed "Contractor's Certificate of Actual Cost," which shall be accompanied and supported by an independent public accountant's certificate as to actual cost in form acceptable to HUD.

D. The Contractor shall include in all subcontracts, equipment leases and purchase orders a provision requiring the subcontractor, equipment lessor or supplier to certify its costs incurred in connection with the project, in the event HUD determines

there is an Identity of Interest between either the Owner or the Contractor and any such subcontractor, equipment lessor or supplier.

#### **Article 13A: Cost Certification -- Lump Sum Contract**

In the event HUD determines that there is an Identity of Interest between the Contractor and the Owner, the Contractor shall certify, on a form prescribed by HUD, its cost incurred in the performance of the work under this contract.

#### **Article 14: Designation of Representatives**

A. The Owner hereby designates \_\_\_\_\_ as its representative for all communications involving work performed pursuant to this Agreement.

B. The Contractor hereby designates \_\_\_\_\_ as its representative for all communications involving work to be performed pursuant to this Agreement.

#### **Article 15: Headings and Titles**

Any heading, section title, paragraph or part of this Agreement is intended for convenience only, and is not intended, and shall not be construed, to enlarge, restrict, limit or effect in any way the construction, meaning, or application of the provisions thereunder, or under any other heading or title.

#### **Article 16: Severability**

The invalidity of any provision of this Contract shall not affect the validity of any other provision, and all other provisions shall remain in full force and effect.

**IN WITNESS WHEREOF**, the parties to these presents have executed this contract in six (6) counterparts, each of which shall be deemed an original, as of the year and day

first above mentioned.

(Seal) Attest:                      Owner

(Seal) Attest:                      Contractor

**Note:**     If Contractor or Owner is a corporation, Secretary should attest.